

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TINO K. THOMAS,

Defendant-Appellant.

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UNPUBLISHED

September 20, 2002

No. 233198

Wayne Circuit Court

LC No. 00-010467

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, after a jury trial, of assault with intent to do great bodily harm (AWIGBH), MCL 750.84, and possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 5 to 10 years' imprisonment for the AWIGBH conviction, to be served consecutively to the mandatory 2-year term for the felony-firearm conviction. Defendant appeals both his conviction for AWIGBH and his sentence. We affirm.

This case arose out of an altercation at a bar. After a group of individuals, including defendant and the victim, was ejected from the bar, defendant retrieved a gun and shot the victim.

Defendant first argues that the evidence was insufficient to support his conviction for AWIGBH. Assault with intent to do great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Eyewitnesses testified that defendant left the scene, then returned with a gun, and shot several times in the victim's direction. The victim testified that defendant continued to try to fire the gun after it apparently jammed. This evidence, taken in the light most favorable to the prosecution, is sufficient to justify the jury's conclusion that defendant had the intent to cause great bodily harm to his victim. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Defendant next argues that his conviction should be reversed because he received ineffective assistance of counsel because defense counsel did not pursue a theory of intoxication as a defense to the charged crime, assault with intent to murder, which requires specific intent.

To establish ineffective assistance of counsel meriting reversal, the defendant must show that the defense counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant's case that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Counsel is not ineffective simply for using a strategy that does not work. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Further, counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). A defense of intoxication is only proper if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent. *People v Mills*, 450 Mich 61, 82-83; 537 NW2d 909, mod 450 Mich 1212 (1995).

Because defendant failed to move for a new trial or evidentiary hearing below, our review is limited to the record. *Snider, supra* at 423. The record contains no evidence that a defense of intoxication would succeed. In his statement to the police, defendant claimed that he was intoxicated on the night of the shooting. Further, the events took place at a club where people were drinking. However, nothing additional was mentioned about defendant's condition. There was no evidence of the extent of defendant's intoxication; nothing demonstrated that he was unable to form the intent to commit the crime. Instead, the testimony that defendant left to get a gun and then returned to the argument was evidence that defendant was capable of forming a plan, from which a jury could infer that defendant could form the intent to cause great bodily harm. Because there was virtually no support in the record for the theory that defendant was intoxicated to the point of being unable to form the requisite intent, defense counsel was not ineffective for failing to raise that meritless defense. *Mills, supra* at 82-83; *Snider, supra* at 425.

Finally, defendant argues the trial court abused its discretion in departing upward from the recommended guideline range. We first note that defendant failed to properly present this issue by failing to provide a copy of the presentence investigation report. See MCL 769.34(8)(b). Under the legislative sentencing guidelines, a score consistent with the jury's verdict resulted in a minimum sentence range of 19 to 38 months' imprisonment. The trial court departed from that range, sentencing defendant to 5 to 10 years (60 to 120 months), instead. The court addressed its reasons for this departure on the record, first noting defendant's history of probation violations, and then stating:

But, additionally, when you look at this particular case this situation, the facts in this case indicate that there was some kind of fight, or whatever it was that occurred. Mainly based on the testimony of one of the witnesses about what she did to the other young lady there, who might have been associated with the defendant. There may have been some anger involved with that. But the matter had moved outside. It probably would have been easily settled, you know, if there was a need to call the police for what this young lady did, hitting somebody with a glass, fine.

But your client, I shouldn't say it that way, but Mr. Thomas brought something different to the mix. He is the one that left what might have been just a little pushing and shoving, or whatever it might have been. He leaves, gets a weapon, and comes back to the scene, you know, with that. It is a very, I think

it's very fortunate [the victim] is not dead. Whether it was fate or whatever intervention you want to call it. I think that justifies, you know, going beyond the guidelines here when we look at the factors here. I am bound by the verdict of the jury, and I recognize that. But I think that my justification for going beyond that is that if somebody chooses to leave the situation like that, go and get a gun and come back with it, that's thought, premeditated. It's not just someone in the heat of anger reaching for a weapon that's on them, or whatever it might be. But having the time to think about doing that, and them coming back, you know, even attempting to shoot them again being a problem with the gun.

In reviewing a departure from the sentencing guidelines' range, the trial court's finding that a particular factor existed is reviewed for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the trial court's determination that the factor constituted a substantial and compelling reason for departure is reviewed for abuse of discretion. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000) (*Babcock I*). Under the sentencing guidelines' act, MCL 769.31 *et seq.*, a sentence must be imposed within the guidelines' range, and appellate review is limited. MCL 769.34(2); MCL 769.34(10); MCL 769.34(11); *Babcock I*, *supra* at 72. If the sentence constituted a departure from the guidelines' range, and the factor was objective and verifiable, this Court must then determine if the trial court had a substantial and compelling reason for the departure. MCL 769.34(11); *Babcock*, *supra* at 74. The phrase "substantial and compelling" constitutes strong language, and applies only in exceptional cases. *Babcock I*, *supra* at 75. "'The reasons justifying departure should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of the sentence.'" *Id.*, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). Factors used in scoring cannot be used a second time to justify a departure from the resulting sentence range unless the court finds from facts in the record that the factor has been given inadequate or disproportionate weight by the scoring. *Id.* at 79; MCL 769.34(3)(b).

Defendant's five probation violations are objective and verifiable, and are not encompassed by the guidelines.<sup>1</sup> Thus, they are proper criteria for determining an appropriate sentence, and were properly considered by the trial court in departing upward from the guidelines' range.

A sentencing court cannot make an independent finding of guilt on a greater charge and then sentence a defendant on the basis of that finding. *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997), citing *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996). However, the trial court can consider the evidence admitted at trial as an aggravating factor in determining the appropriate sentence. *Gould*, *supra* at 89, citing *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995), see also *People v Campagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

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<sup>1</sup> Defendant failed to provide this Court with a copy of the presentence investigation report; however, because there is no dispute regarding the existence of the violations, we consider their existence proven.

Here, the sentencing court recognized the applicable sentencing guidelines' range, but justified an upward departure based on the evidence presented at trial and the circumstances of the case. The court acknowledged that the incident started as a struggle between two other individuals and would probably have been easily resolved had it not been for defendant's intervention. The court recognized that defendant left the scene to get a gun, went back to the scene, and shot at the victim until defendant encountered a problem with the gun. The court did not independently find defendant guilty of a greater offense and sentence defendant according to that offense. Instead, the court considered the evidence produced at trial as an aggravating factor in determining defendant's sentence. The factors considered by the court justified an upward departure from the guidelines' range.

Defendant also argues that his sentence is disproportionate. The extent of the sentencing court's departure from the guidelines can be reviewed if there are adequate reasons for the departure. *People v Babcock*, 250 Mich App 463, 468-469; 648 NW2d 221 (2002) (*Babcock II*); *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). Defendant failed to preserve this claim by providing a copy of the presentence report. See *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). However, given the nature of defendant's crime, we conclude that the extent of the trial court's departure was proportionate based on the circumstances.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Hilda R. Gage